The trustee in the principal case took half the dividend in stock in the coal company, and the other half in cash. But the case differs from the usual case of a stock dividend, for here the stock in effect given to stockholders, was stock in another company. There was no controversy over the stock, so that the interesting question of the right to subscribe to new stock was not raised. The court had to dispose of the cash only; and its decision, together with Petition of Brown,[14] brings Rhode Island in line with the Massachusetts rule.

C. L. M.

SALES—DELIVERY OF GOODS DIFFERING FROM THE DESCRIPTION GIVEN.—The question of the liability of a seller of seeds upon warranties of their identity has been productive of much discussion and litigation. A case on this subject, presenting a rather interesting problem, was recently decided in the House of Lords.[1] A quantity of seed, described as "common English sainfoin," was sold, the following provision being one of the conditions of the sale: "Sellers give no warranty, express or implied, as to growth, description, or any other matters." The seed was re-sold by the buyer, and was later discovered to be "giant sainfoin" and not "common English sainfoin." Of this fact the buyer was ignorant at the time of the sale, as the appearance of the two varieties of seed is substantially identical. The buyer, therefore, sued the seller for damages. In the Court of Appeal[2] he was unsuccessful; but the House of Lords allowed recovery.

Both courts agreed that in a sale by description, it is an implied condition of the sale that the goods furnished be of the same description as those contracted for. Further, upon a breach of this condition, the buyer may do either one of two things: reject the goods, or accept them and sue for damages. Up to this point there is no doubt as to his rights.

This difficulty is, however, now encountered. The courts, in defining the buyer's right to sue for damages upon acceptance of the goods, have invariably said that he can no longer treat the conditions as such, but only as an agreement, a representation, or a warranty. The rule is usually stated somewhat as follows: "If, indeed, he" (the buyer) "has received the whole, or any substantial part, of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more properly, perhaps, ceases to be available as a condition, and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of

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[14] 14 R. I. 371 (1884).

[1] Wallis v. Pratt, App. Cas. 1911, 394.

[2] 79 L. J. K. B. 1013.

agreement, for the breach of which compensation must be sought in damages." [3] These statements are all, if not incorrect, at least most confusing.

If it is true that the condition becomes a warranty upon acceptance of the goods, it follows that a buyer is remediless when there is a non-warranty clause in the contract of sale. This was the conclusion of a majority of the judges in the Court of Appeal in the principal case. The logic of such a position is compelling. But a dissenting opinion by Fletcher Moulton, L. J., considered so satisfactory by the House of Lords that they delivered only short opinions affirming it, looks beneath the surface of the mere words so constantly used by courts and text-writers, and embodied in the Sales Acts, and analyzes the true nature of a condition.

A condition is an implied contract, for breach of which the buyer has two remedies, viz., that of rejecting the goods and treating the contract of sale as rescinded, or that of suing for damages. It is error to conceive of an acceptance of the goods as operating an automatic substitution of a warranty for the condition. When the buyer accepts the goods, he does not thereby waive the conditions; he merely waives one of his remedies therefor. Consequently, the buyer's rights to sue, being independent of any warranty created for the purpose, are not affected by a non-warranty clause in the contract of sale.

The decision of the House of Lords should have the effect of dispersing much of the confusion that has enveloped the distinction between warranties and conditions. The simple fact that one of the remedies for a breach of the latter is also a remedy for a breach of the former, does not, when the buyer avails himself of it, destroy the identity of the condition as such. Whether the obligation in question is a condition or a warranty depends upon the construction of the contract of sale, and not upon matter subsequent thereto. Such matter may take away the superior legal advantages of a condition, as compared with those of a warranty, but does not make it a warranty.

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[3] Williams, J., in Behn v. Burness, 32 L. J. N. S. 204 (1863). Statements to the same effect may be found in Ellen v. Topp, 6 Ex. 424 (1851), and in Bentsches v. Taylor, 2 Q. B. 274 (1893). Mr. Benjamin states the rule in much the same language. Benjamin on Sales, 562. The English Sales of Goods Act of 1893 (generally considered a codification of the pre-existing law on this point) says (Sec. 11, Sub.-sec. 1, Clc.), "Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods." The American Sales Act, Sec. 11, provides that "where the obligations of either party to a contract to sell or a sale are subject to any condition which is not performed, such party may refuse to proceed with the contract or sale, or he may waive performance of the condition. If the other party has promised that the condition shall happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty."

The combination of circumstances found in the principal case is one not likely often to arise. There seems to be only one other decision on similar facts, and it was decided the same way.[4] The recent decision would, therefore, seem to settle the English law on this point.

P. V. R. M.

WASTE—RIGHT OF MORTGAGEE TO RESTRAIN THE MORTGAGOR IN POSSESSION.—There is a Delaware statute which gives the Chancellor power to restrain waste upon mortgaged premises upon petition of the mortgagee. In the case of Ennis v. Smith, et al.,[1] it appeared that the mortgagor had made a contract with a third party to fell and remove certain timber standing on the mortgaged premises. Part of the timber had already been felled, but was still on the mortgaged premises, when the mortgagee secured an injunction to restrain further cutting and to prevent the removal of what was already cut. The court, showing that the statute mentioned was merely an affirmance of a jurisdiction theretofore exercised by the Courts of Chancery, readily granted an order to restrain future cutting, but experienced considerable difficulty in determining whether the trees already felled might be removed or not. After apparent hesitation it granted an order, restraining the removal of the trees cut prior to the service of the preliminary decree, conditional upon the mortgagee's giving bond to indemnify the defendant if it should appear that they were correct in their contention that the order should not cover the removal of the trees already cut. It appeared in the case that the mortgagor was insolvent, though the other defendant was solvent. The mortgage was overdue by reason of the failure of the mortgagor to pay a part of the debt, and therefore the legal title to the premises was in the plaintiff.

A study of the authorities shows that the hesitancy of the Chancellor in extending the injunction to cover the removal of the timber already cut, was proper. The courts in all common law jurisdictions have uniformly granted injunctions upon prayer of the mortgagee to restrain future waste upon the mortgaged premises such as would materially impair the security.[2] Whether the mortgage is to be considered as passing the legal title[3] or as merely giving a lien for the debt,[4] seems not to have been considered by the courts in giving this remedy. In the case under discussion, however, the mortgage being over-due, the mortgages had an undoubted

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[4] Howcroft v. Laycock, 14 Times L. R. 460 (1898).

[1] 80 Atl. Rep. 636 (Del. 1911).

[2] King v. Smith, 2 Hare 239 (Eng. 1843); Delano v. Smith, 206 Mass. 365 (1910).

[3] Prudential Ins. Co. v. Guild, 64 Atl. Rep. 694 (N. J. 1906).

[4] Williams v. Chicago Exhibition Co., 188 Ill. 19 (1900).